

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 20,711  
 )  
Appeal of )

The petitioner appeals the decision by the Department of Aging and Disabilities (DAIL) to reduce the number of hours she receives for personal care attendant services pursuant to the Choices for Care Long-Term Medicaid Waiver (CFC) by eighteen hours every two weeks. The issue is whether DAIL has met its burden of proof to justify the reduction of the petitioner's personal care service hours.

## FINDINGS OF FACT

1. Petitioner is a twenty-one year old paraplegic who is diagnosed with Spinal Muscular Atrophy Type III, a hereditary degenerative disease. Petitioner first became aware of her condition as a young teenager when she could no longer walk independently. Petitioner's condition continued to deteriorate and she became bed-ridden in 2003. She has

severe scoliosis that contributes to muscle weakness and respiratory difficulties. Petitioner is unable to independently sit in an upright position. Petitioner resides with her parents and her mother is paid as a personal care attendant through the Choices for Care program.

2. Petitioner became eligible for services through DAIL several years ago. Petitioner was originally eligible for personal care services through the Home and Community Based Services (HCBS) waiver program. Approximately two years ago, petitioner was grandfathered to the Choices for Care (CFC) program. Both waiver programs pay for personal care attendant services.

3. Petitioner was awarded 139 service hours every two weeks for the 2005 service year (HCBS) and 139 service hours every two weeks for the 2006 service year (CFC). DAIL is proposing 116 service hours every two weeks for the 2007 service year, an eighteen hour reduction every two weeks. Petitioner's service hours for past service years and the proposed 2007 service year include variances granted by DAIL because her needs are greater than the program maximums for certain activities of daily living.

4. N.M. is a DAIL Medicaid Waiver supervisor. N.M. supervises the twelve Long-Term Care Clinical Coordinators

(LTCCC) who determine the amount of services granted for recipients of the Choices for Care (CFC) waiver program. Prior to the CFC program, N.M. reviewed the service requests for personal care services under DAIL's prior home based waiver programs. N.M. clarified the continuity between DAIL's earlier waiver programs and CFC. Continuities include:

- a) DAIL relies on case managers from organizations such as an area agency on aging to meet with the participants and complete the Independent Living Assessment (ILA) and to provide baseline information about the program participants.
- b) In terms of the time limits for activities of daily living, DAIL developed the limits based upon the experience of the PDAC program and the Home and Community Based Services waiver program.
- c) The HCBS and CFC regulations are congruent.
- d) DAIL's determination takes into account services provided under other programs in order to prevent duplication of services.

N.M. further testified that some HCBS participants were awarded excessive service hours that the CFC program was to address. N.M. did not provide any specific testimony regarding petitioner's prior assessments under both the HCBS and CFC programs.

5. In the CFC waiver program, a case manager submits an ILA to DAIL. The ILA is comprised of several sections

including an assessment of Activities of Daily Living (ADL), assessment of Instrumental Activities of Daily Living (IADL), and a medical assessment of the individual's health. The assessment is done in the individual's home by the case manager and a registered nurse with the participation of the individual and, if appropriate, family members and personal care attendants. The case manager completes the sections for ADLs and IADLs, and the registered nurse completes the health section.

The ADLs include dressing, bathing, personal hygiene, bed mobility, toilet use, adaptive devices, transferring, mobility, and eating. The CFC waiver includes meal preparation and medication management in the ADLs even though they are IADLs. The CFC waiver caps the remaining IADLs at 330 minutes per week. DAIL will look at the individual's living situation when determining the amount of IADLs. For example, the IADLs may be reduced if there is overlap between the family and individual; i.e. the family doing the individual's laundry as part of the family laundry. Additional time is allowed for incontinence assistance.

Level of care ranges from:

- a) 0 independent
- b) 1 supervision
- c) 2 limited assist
- d) 3 extensive assist
- e) 4 total dependence

Recognizing that an individual may need time in excess of the maximum time limits for his/her level of care, an individual may apply for a variance.

The ILA and supporting materials are reviewed by a Long-Term Care Clinical Coordinator (LTCCC) who recommends the actual amount of services. When DAIL receives a new application, the LTCCC will meet with the applicant. When DAIL receives a reassessment of a current CFC participant, the LTCCC is not required to meet with the participant and, normally, does not meet with the participant.

6. For the 2006 service year, petitioner was approved for 4180 minutes per week or 139 hours every two weeks for the period of November 12, 2005 through November 11, 2006.<sup>1</sup> The Home Based Service Plan was signed by M.K., the LTCCC. Petitioner was rated as total dependence for her level of care. The breakdown for petitioner's CFC services was:

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<sup>1</sup>The ILA is set up to requests minutes per week for each ADL. DAIL then converts the weekly totals to hours for a two week period (corresponding to pay periods).

Dressing	210 minutes
Bathing	420
Personal Hygiene	420
Bed Mobility	630
Toilet Use	420
Transferring	315
Mobility	0
Eating	420
Meal Preparation	315
Medication Management	700
IADLs	330

The times reflect variances for bathing, personal hygiene, bed mobility, toilet use, transferring, and eating.

7. For the 2007 service year, petitioner submitted a request for the following break-down of services:

Dressing	210 minutes/week
Bathing	420
Personal Hygiene	420
Bed Mobility	630
Toilet Use	420
Adaptive Devices	0
Transferring	315
Mobility	0
Eating	420
Meal Preparation	420
Medication Management	700
Incontinence Assist	
Bowel	10
IADLs	330

Petitioner sought 4295 minutes per week or 143.16 hours every two weeks. Petitioner continued to request variances for bathing, personal hygiene, bed mobility, eating, and medication management. Petitioner requested two changes

including an additional 105 minutes for meal preparation and a request for incontinence assistance.

8. DAIL's decision to reduce petitioner's service hours by eighteen hours every two weeks was based on the review by M.K., LTCCC. M.K. made the following decisions regarding the 2007 service year plan:

Dressing	210 minutes per week
Bathing	315
Personal Hygiene	315
Bed Mobility	420
Toilet Use	420
Adaptive Devices	0
Transferring	315
Mobility	0
Eating	315
Meal Preparation	420
Medication Management	420
Incontinence Assist	
Bowel	30
IADLs	300

The 2007 service plan proposes 3480 minutes per week or 116 hours per two week period. M.K. changed the level of care from four (total dependence) to three (extensive assist) for dressing, bathing, personal hygiene, and eating. M.K. increased the amount of incontinence assistance requested by petitioner by twenty minutes per week. M.K. granted variances for dressing, bathing, personal hygiene, bed mobility, toilet use, transferring, eating, and medication management.

9. The proposed 2007 service plan makes the following reductions to petitioner's services from the prior service year:

Bathing	105 minutes per week reduction
Personal Hygiene	105 minutes
Bed Mobility	210 minutes
Eating	105 minutes
Medication Mgtment.	280 minutes
IADLs	30 minutes

A chart is added as Appendix 1 with a side-by-side comparison of the 2006 service year, DAIL's recommendations for the 2007 service year, and the proposed time changes.

10. On December 15, 2006, DAIL sent petitioner a notice stating:

Based on the information provided, the services you requested were reduced or denied because the information submitted did not justify a need for the amount or type of services requested.

The notice explained that the petitioner could request a commissioner's review within thirty days or request a fair hearing within ninety days. The effective date for the reduction in services was January 23, 2007. Because petitioner requested a fair hearing prior to the effective date of the reduced services, she continues to receive services pursuant to the 2006 service year.

11. C.M. is a case manager with CVCOA and has worked in that capacity for six years. During the fall of 2006, C.M.



was assigned to petitioner's case. Her duties included meeting with petitioner to complete the ILA and other materials for petitioner's 2007 service year CFC request. B.H. is a case manager with CVCOA and has over twelve years experience. C.M. removed herself from petitioner's case<sup>2</sup>, and B.H. took over the case on or about December 1, 2006 and completed the process with DAIL. Both C.M. and B.H. support petitioner in her appeal.

12. During the reassessment, C.M. and M.K. spoke by telephone on November 6, 2006. As part of the telephone call, M.K. clarified that a variance request needed a medical reason for exceeding the time limits. Petitioner and her mother became part of the telephone conversation between C.M. and M.K. and explained their requests.

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<sup>2</sup>There were disputes between C.M. and M.K. C.M. testified that she removed herself because she felt uncomfortable proceeding on behalf of petitioner.

13. On November 9, 2006, C.M. mailed the proposed Plan of Care, ILA<sup>3</sup>, variance request, and documentation to N.M.

C.M. made the following variance requests:

- a) Bathing based on daily full bed bath, shampooing twice a week, special acne treatment, anti-fungal treatment, and care of hest skin. Noted need for additional time needed while menstruating.
- b) Personal hygiene based on full skin care and peri care at night, facial and mouth care three times/day following nebulizer use, exfoliation of feet daily, and shaving.
- c) Toilet use based on total dependence.
- d) Eating based on petitioner only being able to feed herself certain solid foods.
- e) Medication management based upon administration of multiple medications, nebulizer use.

14. M.K. is a R.N. who has worked as a LTCCC since October 2005. M.K. has prior experience as a nurse in a hospital setting and in a home health setting. M.K. met petitioner briefly during March 2006, but has not done a home assessment of petitioner. M.K. was involved in petitioner's 2006 service year reassessment. To determine petitioner's

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<sup>3</sup>On the Personal Care Worksheet, C.M. wrote, "Times requested by client. I have informed her that times exceed maximums of CFC program." Although this statement elicited a great deal of discussion at the hearing including DAIL's assertion that this statement was an admission by C.M. that the requested times were too high, the issue is a red herring. Petitioner has historically been granted times in excess of program maximums through the granting of variances by DAIL. The parties may now disagree as to whether times for particular ADLs should be reduced, but there is no disagreement as to the need for the variances.

2007 service hours, M.K. used the materials from C.M., applied her clinical judgment, and used the utilization review process. M.K. kept notes from the utilization review with N.M. on November 16, 2006 and notes on the final utilization review.

15. The record does not indicate any changes to petitioner's underlying condition or functional abilities over the past few years. M.K. is in agreement that petitioner's condition has not changed.

16. M.K. testified at the hearing to explain her reasoning for the changes she made to petitioner's service needs. M.K.'s testimony did not detail any functional changes in petitioner's physical abilities over time, did not provide any information that past assessments did not consider petitioner's functional abilities, and did not detail any specific mistakes by DAIL.

17. S.D. is a board certified LNA who has been providing care for petitioner over nine months through the local home health agency. B-A.G. is a LNA who has been providing care for petitioner for one year through the local home health agency.<sup>4</sup> As part of their duties, they provide a

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<sup>4</sup> Both S.D. and B-A.G. provide personal care services and respite services.

range of services for petitioner such as bathing, personal hygiene, dressing, and eating. They testified that proposed reductions would not leave sufficient time for petitioner's ADLs.<sup>5</sup>

18. Dr. P.B. testified. Dr. P.B. is a board certified neurologist who has treated petitioner for the past seven years. In addition to seeing petitioner in medical settings, he has seen petitioner in her home. Petitioner has a degenerative disease; she will not improve over time. Dr. P.B. does not know the CFC criteria. Dr. P.B. testified that his concern is the risk of harm to petitioner if her support services are decreased. He noted that many patients with petitioner's level of impairment are institutionalized and that a reduction in services could lead to institutionalization.

ORDER

DAIL's decision to reduce CFC services to petitioner is reversed.

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<sup>5</sup> Both LNAs described doing ADLs with petitioner. Their testimony demonstrated that petitioner was unable to assist with dressing, bathing, and personal hygiene although M.K. had assumed petitioner could assist with those activities.

REASONS

A. Sufficiency of Notice

Petitioner received a notice reducing her CFC benefits on December 15, 2006 indicating that her CFC services were being reduced based on a determination by DAIL that the information they received did not support petitioner's request for services. Based on this notice, petitioner first argues that DAIL violated the petitioner's right to due process by giving her inadequate notice for the proposed reduction in benefits, and, as a result, DAIL's action to reduce benefits should be voided. Goldberg v. Kelly, 397 U.S. 254 (1970), Matthews v. Eldridge, 424 U.S. 319 (1976). Petitioner argues that DAIL should specifically set out the factual bases for its conclusions.

The Vermont Supreme Court recognizes that the Vermont Administrative Procedures Act at 3 V.S.A. § 809(b) incorporates the minimum due process requirements of adequate notice or notice that sufficiently apprises a person of the nature of the proceedings so that there is no unfair advantage or surprise at a hearing. In Re: Hot Spot, Inc., 149 Vt. 538 (1988); In Re: Desautels Real Estate, Inc., 142 Vt. 326 (1982); In Re: Vermont Health Corp., 155 Vt. 457 (1990). See also In Re: Petition of Twenty-four Vt.

Utilities, 159 Vt. 363 (1992) (requirements of due process met when the parties have the ability to prepare and respond to the issues).

Although DAIL's notice may not be optimal, petitioner had ample opportunity to obtain information from DAIL, prepare and respond to the issues of this case. As a result, petitioner's due process rights were protected. See Fair Hearing No. 14,759.

B. Burden of Proof

Petitioner has received attendant care services through DAIL for several years. When petitioner first received attendant care services through the HCBS waiver, DAIL made a determination that petitioner needed nursing home level care. DAIL set petitioner's level of services based upon her unique needs and functional abilities.

Over two years ago, petitioner was grandfathered into the CFC program. When petitioner was grandfathered into the CFC program, she became an eligible participant whose service needs were and are reviewed annually through the reassessment process. CFC 1115 Long-Term Care Regulations, Section VII(B). The CFC waiver not only gives participants the option of remaining in their homes and communities through appropriate personal care services, the CFC program is

intended to protect the health and welfare of recipients. CFC 1115 Long-Term Care Regulations, Sections II and VII(B)(6).

Although the CFC waiver has superseded the HCBS waiver, N.M., DAIL Medicaid Waiver Supervisor, testified that the regulations in the two programs are congruent. Both programs use the ILA, use the same program maximums for ADLs, and allow participants to seek a variance when the participant needs time over and above the program maximums for a particular ADL.

This case stems from petitioner's second annual CFC reassessment. Under the CFC program, DAIL uses a LTCCC to review the reassessment and make a recommendation. In petitioner's case, the same LTCCC was involved in the 2006 service year and 2007 service year reassessments.

In Fair Hearing No. 20,148, the Board set out in detail that DAIL has the burden of proof in reducing or terminating CFC benefits and the Board adopts said analysis here. In brief, Fair Hearing Rule No. 11 places the burden of proof upon the agency when the agency has decided to reduce assistance. Fair Hearing Rule No. 11 is based upon the constitutional analysis found in Goldberg v. Kelly, *supra*,

that due process attaches when a state agency proposes a reduction in benefits.

DAIL has proposed reducing petitioner's CFC services by eighteen hours every two weeks. DAIL has the burden of proof that such a reduction is necessary.

Weaver v. Colorado Dept. of Social Services, 791 P. 2d 1230 (1990) is instructive. Colorado proposed terminating Weaver's HCBS waiver services even though Weaver's underlying medical and physical condition had not changed. The Court stated on page 1235, "due process prevents a termination of these benefits absent a demonstration of a change in circumstances, or other good cause."

Benefits should not be terminated or reduced unless there is a change in circumstances such as a change in the petitioner's underlying condition and abilities. Before DAIL can reduce petitioner's benefits, DAIL must establish by a preponderance of evidence that the petitioner's functional abilities have improved and she no longer needs the same level of services.

There is no evidence that petitioner's underlying medical condition and resulting functional abilities have improved. There is no basis for finding a change to



petitioner's circumstances that would lead to a change in her benefits. M.K.'s testimony supports this proposition.

The question is whether DAIL can show "other good cause" to justify a reduction in petitioner's benefits. DAIL has argued that past benefits in the HCBS program were excessive. N.M. made a general statement that participants were granted excessive services under the HCBS program and that corrections would be made under the CFC program.

There are two major problems with N.M.'s testimony. First, *assuming arguendo* that petitioner's HCBS were excessive, DAIL's reassessment of petitioner's needs under the CFC program for service year 2006 provided the opportunity for correction. No correction or change in the overall service levels occurred during the 2006 service year reassessment. Second, and more importantly, N.M.'s testimony did not point to any specifics regarding decisions made in petitioner's case for prior service years under both the HCBS and CFC waivers. Stating a conclusion without specific supporting evidence is not sufficient for DAIL to meet its burden of proof.

In addition, DAIL presented the testimony of M.K., the LTCCC. M.K. has not done an in-person assessment of petitioner. The CFC regulations only call for an in-person

assessment for a new applicant. M.K. provided testimony regarding her analysis of petitioner's request for the 2007 service year.<sup>6</sup> M.K. did not provide testimony setting out any errors from previous service year plans. M.K. did not testify regarding any decisions she made in regard to the 2006 service year services and why any of those decisions was in error. Once again, without specific testimony showing prior errors, DAIL has not met its burden of showing "other good cause" to justify a reduction in petitioner's service hours.

DAIL points to the case of Husrefovich v. Dept. of Aging and Independent Living, 2006 VT 17 (2006) for support. The Husrefovich decision stands for the proposition that petitioner's service hours should be warranted by her medical condition, and that those service hours will not be continued unless petitioner continues to need the same level of services.

DAIL's argument ignores that they have the burden of proof to demonstrate that petitioner's services should be reduced. DAIL granted petitioner 139 services hours every

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<sup>6</sup> It is not necessary to recapitulate M.K.'s testimony setting out her reasoning for the 2007 service year. The evidence is not relevant to whether DAIL made prior mistakes. Without specific evidence from DAIL regarding prior mistakes, there is no basis to evaluate if M.K.'s present testimony supports that conclusion.

two weeks for both the 2005 and 2006 service years.

Petitioner's underlying medical condition and resulting functional limitations have not changed. Dr. P.B. voiced his concern that a decrease in services would adversely impact petitioner by making her institutionalization more likely. S.D. and B-A.G. provide personal care services for petitioner and explained their concerns that a reduction in services would lead to insufficient time for petitioner's ADLs.<sup>7</sup>

DAIL has not demonstrated that petitioner's condition has changed so that her service hours should be decreased and has not demonstrated any other good cause to reduce petitioner's benefits. Accordingly, DAIL's decision to reduce petitioner's service hours is reversed, and DAIL's granting of the new request for incontinence assistance should remain. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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<sup>7</sup> Petitioner and her witnesses testified to petitioner's functional abilities and whether petitioner was able to assist in her care to the extent M.K. believed petitioner could do. Based on their first hand experience, they did not believe so. However, it is not necessary to address each ADL as DAIL has not met their underlying burden of proof.

## Appendix 1

	2006 SERVICE YEAR	DAIL 2007 SERVICE YEAR	CHANGE
Dressing	210	210	
Bathing	420	315	(105)
Personal Hygiene	420	315	(105)
Bed Mobility	630	420	(210)
Toilet Use	420	420	
Transferring	315	315	
Mobility	0	0	
Eating	420	315	(105)
Meal Preparation	315	420	105
Medication Mgt.	700	420	(280)
IADL	330	300	( 30)
Incontinence Assist		30	30
Hours/2 weeks	139	116	